Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT L. TUCKER, JOYCE BANKS, WILL McGAUGHY, NAPOLEON HANEY, LAUREL PRUSSING, JOAN M. CLARK, OUSLEY H. WALKER, CAROLYN TONEY, JOSEPH BELMAN, President of the Illinois Hispanic Council, Joliet Chapter, RICHARD J. WALSH, President of the Illinois State Federation of Labor, AFL-CIO, and JAMES CLARIN,

Petitioners,

v.

UNITED STATES DEPARTMENT OF COMMERCE, ROBERT A. MOSBACHER, as Secretary of the Department of Commerce, MICHAEL R. DARBY, as Under Secretary for Economic Affairs of the United States Department of Commerce, BUREAU OF THE CENSUS, BARBARA E. BRYANT, as Director of the Bureau of the Census, GEORGE H. W. BUSH, as President of the United States, and DONNALD K. ANDERSON, as Clerk of the United States House of Representatives,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an action brought by American Citizens to contest the constitutionality of the refusal of the Department of Commerce to conduct the most accurate census practicable by employing statistically sound, available methods to address and correct an acknowledged, confirmed and quantifiable "chronic undercount" of African-Americans, Hispanic-Americans and urban and rural poor states a valid, justiciable claim for relief under the "political question" doctrine established by this Court.

2. Whether plaintiffs, African-Americans, Hispanic-Americans and residents of urban areas and of a state which have disproportionately greater percentages of the "chronically undercounted" than the nation generally,

correction of the "chronic undercount" of African-Americans, Hispanic-Americans and urban and rural poor when (1) plaintiffs include members of the class of persons chronically undercounted, (2) plaintiffs face dilution of their voting rights through utilization of undercounted census figures in the redistricting process, and (3) units of government supported through the taxes paid by plaintiffs receive governmental grants and public funding on the basis of those distorted and undercounted census figures.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT AND IN THE UNITED STATES COURT OF APPEALS

Plaintiffs in the United States District Court for the Northern District of Illinois, all of whom appealed the decision of the District Court to the United States Court of Appeals for the Seventh Circuit, included Robert L. Tucker, Joyce Banks, Will McGaughy, Napoleon Haney, Laurel Prussing, Joan M. Clark, Ousley H. Walker, Carolyn Toney, Joseph Belman, President of the Illinois Hispanic Council, Joliet Chapter, Richard J. Walsh, President of the Illinois State Federation of Labor, AFL-CIO, and James Clarin. Plaintiffs in the District Court are petitioners in this Court.

Defendants in the District Court and the United States Court of Appeals for the Seventh Circuit included the United States Department of Commerce, Robert A.

Mosbacher, as Secretary of the United States Department of Commerce, Michael R. Darby, as Under Secretary for Economic Affairs of the United States Department of Commerce, Bureau of The Census, Barbara E. Bryant, as Director of the Bureau of the Census, George H.W. Bush, as President of the United States, and Donnald K. Anderson, as Clerk of the United States House of Representatives. Those defendants are respondents in this Court.

In the District Court, the State of Illinois filed a motion seeking leave to intervene as a party plaintiff. That motion was denied by the District Court March 12, 1991. The State of Illinois did not appeal from the denial of the motion for leave to intervene.

In the United States Court of Appeals for the Seventh Circuit, the City of

Chicago sought and was granted leave to appear as an amicus curiae, and it filed briefs in support of the petitioners' claims.

TABLE OF CONTENTS

Questions Presented for Review i

Parties to the Proceedings in the United States District Court and in the United States Court of Appeals . . 1

Table of Contents 3

Appendix 3

Table of Authorities 4

Citations to Opinions Below 6

Jurisdictional Statement 7

Constitutional and Statutory Provisions Involved 9

Statement of the Case 11

Argument 14

Conclusion 28

APPENDIX

March 12, 1991 Decision of the United States District Court for the Northern District of Illinois . . . . . App. 1

March 16, 1992 Opinion of the United States Court of Appeals for the Seventh Circuit . . . . . App. 37

April 29, 1992, Order of the United States Court of Appeals for the Seventh Circuit denying plaintiffs' petition for rehearing with suggestion for rehearing en banc . . . . . App. 78

Constitutional and Statutory provisions involved . . . . . App. 80

TABLE OF AUTHORITIES

Cases

Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962) 21-

Carey v. Klutznick, 637 F.2d 834 (2nd Cir. 1980) 26, 27

City of New York v. United States Department of Commerce, 739 F.Supp. 761 (E.D.N.Y.) 1990 . . . . . 26, 27

City of Philadelphia v. Klutznick, 503 F.Supp. 663 (E.D. Pa., 1980) 26, 27

City of Willacoochee v. Baldridge, 556 F.Supp. 551 (S.Ga. 1983) . . 26, 27

Hastert v. Illinois State Board of Elections, 777 F.Supp. 634 (N.D. Ill. 1991) 16

Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1963) 21,22

Wesberry v. Sanders, 376 U.S. 1, 11 L.Ed.2d 481, 84 S.Ct. 526 (1964) . . 22

Young v. Klutznick, 497 F.Supp. 1318 (E.D. Mich. 1980), reversed on the grounds, 652 F.2d 617 (6th Cir. 1981), cert. denied, 455 U.S. 939, 71 L.Ed.2d 650, 102 S.Ct. 1430 (1982) 26, 27

Other Authorities

U.S. Const. Art. I, §2 . . . . . 8, 18

U.S. Const. Art. II, §1 9

U.S. Const. Amend. XIV 8, 17, 18

2 U.S.C. §2a.(a)(b) (1990) 8

3 U.S.C. §3 (1990) 9

5 U.S.C. §702 (1990) 8

13 U.S.C. §141 (1990) 8, 9

28 U.S.C. §1254 (1992) 7

28 U.S.C. §1331 (1990) 8

28 U.S.C. §1337 (1990) 8

28 U.S.C. §1361 (1990) 8

28 U.S.C. §2101(c) (1990) 7

United States Supreme Court Rule 13.1 . 7

United States Supreme Court Rule 13.4 7,8

United States Department of Commerce, Department Organization Order 35-2A . 9

CITATIONS TO OPINIONS BELOW

This action was brought in the United States District Court for the Northern District of Illinois. The matter proceeded before that Court on defendants' motion to dismiss plaintiffs' complaint, and, on March 12, 1991, the District Court issued its order and opinion granting defendants' motion to dismiss, holding that plaintiffs' claim presented a nonjusticiable "political question."

A timely appeal was filed, and the United States Court of Appeals for the Seventh Circuit, on March 16, 1992, issued its Opinion affirming the District Court's dismissal of the complaint. Thereafter, on March 30, 1992, plaintiffs filed a timely petition for rehearing, with

suggestions for rehearing en banc. That petition was denied April 29, 1992.

The opinions of the District Court and of the Court of Appeals are unreported as of the filing of this Petition. They appear in the appendix to this Petition.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254. The Court of Appeal's opinion was filed March 16, 1992, and, pursuant to 28 U.S.C. §2101(c) and United States Supreme Court Rules 13.1 and 13.4, the present petition is timely and appropriate for consideration by this Court. On March 30, 1992, petitioners filed a timely Petition for rehearing before the United States Court of Appeals for the Seventh Circuit. That Petition for Rehearing contained, in addition, suggestions for rehearing en banc, and the

petition for rehearing was denied April 29, 1992. By operation of Rule 13.4, the time for filing petitioners' Petition runs from April 29, 1992, upon denial of the Petition for Rehearing.

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§1331, 1337 and 1361, as well as 5 U.S.C. §702. Petitioners' claims arise under Article 1, §2 of the United States Constitution, as amended by §2 of the Fourteenth Amendment, as well as under United States Statutes intending to implement the constitutional requirements of apportionment and an accurate census, as well as rules promulgated by the United States Department of Commerce in compliance with the statute, specifically in this regard 2 U.S.C. §2a.(a)(b), 13 U.S.C. §141 and United States Department

of Commerce, Department Organization Order 35-2A.

Petitioners also asserted claims pursuant to Article II, Section 1 of the United States Constitution, which requires that the number of electors which each state appoints to the Electoral College be equal to the number of members in the House of Representatives and Senate of the United States Congress to which the state is entitled, which constitutional requirement has been implemented by Congress through 3 U.S.C. §3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due to the length of the provisions involved, which are cited below, their pertinent text is set forth in the Appendix:

U. S. Const. Art. I, § 2 . App. 80

U. S. Const. Art. II, § 1 . App. 82

U. S. Const. Amend. V . . App. 88

U. S. Const. Amend XIV . . App. 88

U. S. Const. Amend XV . . . App. 90

2 U.S.C. § 2a.(a)(b)(1990) . App. 91

3 U.S.C. § 3 (1990) . . . . App. 93

5 U.S.C. §§ 551, et seq. (1990) . . . . . App. 94

5 U.S.C. § 701(a)(2)(1990) App. 101

5 U.S.C. § 702 (1990) . . App. 101

13 U.S.C. § 141 (1990) . App. 103

28 U.S.C. §1254 (1992) . . App. 110

28 U.S.C. § 1291 (1990) . App. 111

28 U.S.C. § 1331 (1990) . App. 112

28 U.S.C. § 1337 (1990) . App. 112

28 U.S.C. § 1361 (1990) . App. 114

28 U.S.C. § 2101(c)(1990) App. 114

42 U.S.C. § 1973 (1990) . App. 115

U.S. Dept. of Commerce, Dept. Organization Order 35-2A, 40 Fed. Reg. 42, 765 (1975) . App. 118

STATEMENT OF THE CASE

For the last five decennial censuses, the United States Government has detected a persistent, chronic undercount of certain discrete classes of Americans, principally African-Americans, Hispanic-Americans and the urban and rural poor. (Petitioners' Complaint, pars. 36-37). The amount of the chronic undercount has remained about 6% greater than the undercount of white, non-poor Americans in the United States. (Id., par 37). The United States Government, prior to the 1990 decennial census, announced an ability to measure and to employ statistical methods to correct the chronic undercount.

Nevertheless, the Commerce Department determined not to take measures to correct the chronic undercount, essentially

overruling the Census Bureau and its announced intention to employ those corrective measures. When originally challenged in the United States District Court for the Eastern District of New York, the executive branch of the United States Government entered into a stipulation to revisit the statistical correction issue with an "open mind", and, toward that end, the Commerce Department employed typical administrative procedures, solicited comment upon guidelines and, ultimately, enacted "guidelines" to govern a decision whether to correct the undercount.

Upon promulgation of those "guidelines", which these petitioners viewed to be tantamount to an invitation to the Secretary of Commerce to use his or her unfettered discretion, these

plaintiffs filed suit in the United States District Court for the Northern District of Illinois, seeking, among other things, injunctive relief to require statistical correction of the chronic undercount. The defendants sought dismissal of petitioners' claims due to petitioners' claimed lack of standing and the absence of a justiciable question for the Court's review. The Government contended that the challenge to the census methodology was not ripe and, in any event, presented a "political question" which the judiciary could not address.

The District Court held that plaintiffs' census challenge presented a "political question", and the United States Court of Appeals for the Seventh Circuit affirmed, likening plaintiffs' challenge against the census methodology

to a private citizen's disapproval of the work of the United States Weather Service. A timely petition for rehearing was denied April 29, 1992.

ARGUMENT

The rights which petitioners seek to enforce are fundamental to our system of government, even though, as to the African-American petitioners in this case, they are rights which were not even recognized in our Government until after the Civil War. These rights, secured through the suffering of millions of American soldiers and civilians, recognize that every American citizen stands on equal footing with all other American citizens in the enjoyment of the rights secured by law, including the right to be counted in the national Census.

Our constitutional recognition of the rights of the individual run throughout the Bill of Rights and, in the context of voting rights, are reflected in this Court's seminal adoption of the "one person, one vote" principle. This case calls upon this Court to recognize and to protect the "one person, one vote" tenet of our constitutional structure: What purpose is there to express the principle of "one person, one vote" while at the same time permitting the Government to conduct an admittedly inaccurate census whose inaccuracies are disproportionately placed upon discrete racial and ethnic minorities and upon the poor?

In Illinois, for example, the United States District Court for the Northern District of Illinois adopted a redistricting plan for the Illinois

delegation to the United States House of Representatives on the expressed basis that the successful redistricting proposal had population deviations of zero from one congressional district to the other, while the unsuccessful redistricting plan had a total deviation of 13 persons (out of more than 576,000) from the largest proposed district to the smallest proposed district. See Hastert v. Illinois State Board of Elections, 777 F.Supp. 634 (N.D. Ill. 1991). A total difference of thirteen people in districts containing more than 576,000 each was deemed sufficient by a three-judge court to warrant approval of one legislative redistricting plan over another, but that legislative structure only makes sense or enjoys any intuitive measure of validity if the count of the population was

accurate in the first place, or, at the very least, expressed its inaccuracies evenly across all members of the population.

Nothing in the Constitution or our history (with respect either to the Constitution originally ratified or to the Fourteenth Amendment) supports any suggestion or inference that the fundamental issue of a complete and accurate count of the population--a straightforward, statistical, scientific procedure--would ever be subject to partisan discretionary decisions within the Executive or Legislative branches of government whether to accept or to permit correctable statistical deficiencies to remain uncorrected for any reason, let alone the particular thought processes of the individual who happens to serve as

Secretary of the Department of Commerce at the time the decision is made. In the particular context of the Fourteenth Amendment's repeal of the "three-fifth's of a man" provisions of Article I, Section 2 of the United States Constitution, it seems impossible to imagine that the four-year war waged to preserve our constitutional structure, remove the shame of slavery and recognize the fundamental rights of citizenship of the emancipated Americans was fought in order to afford discretion to subsequent presidents and subsequent sessions of the Congress to determine whether a disproportionate undercount and diminishment of rights of African-Americans and others is tolerable in light of the political exigencies of the day.

Nevertheless, that is precisely the interpretation given by the District Court and the Court of Appeals. Neither court appears willing to address the duty imposed upon the judiciary to decide the issues presented by petitioners' claims. Neither court appears to have recognized the fundamental and absolute nature of the rights at issue. Indeed, the District Court suggested that, rather than approach the judiciary with their claims, petitioners might be better served by petitioning the Congress for legislative assistance to enforce those constitutional rights, while the Court of Appeals so trivialized petitioners' claims as to draw an analogy to persons unsatisfied with the efficiency or accuracy of the United States Weather Service.

Federal governmental aid to states and state distribution of governmental aid is not based upon the findings of the weather service, legislative districts for local, state and federal office are not drawn on the basis of the weather service and, most assuredly, no civil war was fought to effectuate a fundamental change in the United States Weather Service. If for no other reason, this Court should accept review of this case just to advise the District Court and the Court of Appeals that more is involved in this litigation than the discretionary decision-making of a cabinet officer or the efficiency of a branch of government.

Despite the Court of Appeals' dismissal of Petitioners' claims, the fact remains that this case presents an important issue for this Court's

determination, questions which are founded primarily upon the Constitution and secondarily through the implementing statutes. For thirty years, this Court has recognized and advanced the principle of "one person, one vote", and the Court has refused to extend the "political question" doctrine to foreclose judicial review of legislative apportionment and legislative structures which violate the "one person, one vote" principle. In Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962), a decision brought on by the vision and fortitude of Attorney Z.T. Osborn of Tennessee, this Court examined the "political question" doctrine and defined its limits. Similarly, in Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1963), the Court acknowledged that "to the extent

that a citizen's right to vote is debased, he is that much less a citizen....but the basic principle of representative government remains, and must remain, unchanged--the weight of a citizens' vote cannot be made to depend on where he lives." 377 U.S. at 567. Finally, this Court, in Wesberry v. Sanders, 376 U.S. 1, 11 L.Ed.2d 481, 84 S.Ct. 526 (1964), formerly announced the "one person, one vote" doctrine, as it has now come to be known.

Having recognized the justiciability of that standard of "one person, one vote", the courts cannot, we submit, refuse or decline enforcement of that principle as it relates to the evidentiary base from which courts determine whether the principle has been served or abandoned in a particular instance.

The Court of Appeals recognized that the limits of a "political question" doctrine do not extend to bar judicial consideration of the present case, and the Court also recognized that petitioners have standing to assert the claims under the principles of standing established under Article 3 of the United States Constitution. The Court of Appeals declined to address the merits of petitioners' claims, however, on the basis of a newly announced standing analysis, coined the "intended plaintiff doctrine" by the Court of Appeals. (App. 60)

It is in the context of the "intended plaintiff" doctrine that the Court of Appeals compares the petitioners' claims to a dispute with the United States Weather Bureau or any of the other governmental statistical services provided

by various federal agencies, including the Bureau of Labor Statistics and the like. (App. 60-70).

The crux of the Court of Appeals' analysis is the Court's professed inability to decide the merits of petitioners' claims due to the absence of "judicially administrable standards. The plaintiffs are not asking us to create equality. They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census head-count." (App. 71-72).

Petitioners respectfully submit that the Court's concern does not justify a refusal to hear petitioners' claims. Prior to pronouncement of the "one person, one vote" principle, the courts had

professed little experience with demographers, statisticians and political scientists and few "judicially administrable standards" governing the rejection or approval of apportionment plans. Nevertheless, because the Constitution required development of such standards, the judicial branch developed those standards and now resolves those disputes.

Courts routinely confront disputes among experts in fields beyond the normal ken of judges, and juries do as well. The fact that the courts have not yet developed "judicially administrable standards" to determine whether a more accurate census count is obtainable means only that the first cases decided by the courts may prove more difficult than later

cases, after appropriate standards are developed.

In that regard, the present case is not the first time in which persons have challenged the failure of the Census Bureau to conduct the most accurate census available, and the United States District Court for the Eastern District of New York has been receiving evidence relating to the census "chronic undercount." Petitioners' counsel understand and expect that respondents' counsel will confirm that the District Court in New York has taken evidence in City of New York v. United States Department of Commerce, one of the reported decisions which can be found at 739 F.Supp. 761 (E.D.N.Y. 1990).

Further, District Courts in the Second, Third, Sixth and Eleventh Circuits have recognized the justiciability of

claims challenging the method of conducting the decennial census. (Carey v. Klutznick, 637 F.2d 834 (2nd Cir. 1980), affirming preliminary injunction entered in Carey v. Klutznick, 508 F.Supp. 416 (S.D.N.Y. 1980); City of Philadelphia v. Klutznick, 503 F.Supp 663 (E.D. Pa. 1980); Young v. Klutznick, 497 F.Supp.1318 (E.D. Mich. 1980), reversed on the grounds, 652 F.2d 617 (6th Cir. 1981), cert. denied, 455 U.S. 939, 71 L.Ed. 2d 650, 102 S. Ct. 1430 (1982); and City of Willacoochee v. Baldridge, 556 F.Supp. 551 (S.D. Ga. 1983).

In denying the existence of "judicially administrable standards" to employ in order to adjudicate petitioners' claims, the Court of Appeals conflicts with the courts in other circuits, and

this conflict among the circuits compels this Court's acceptance of the case.

CONCLUSION

For these reasons, petitioners pray that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT L. TUCKER, JOYCE BANKS, WILL McGAUGHY, NAPOLEON HANEY, LAUREL PRUSSING, JOAN M. CLARK, OUSLEY H. WALKER, CAROLYN TONEY, JOSEPH BELMAN, President of the Illinois Hispanic Council, Joliet Chapter, RICHARD J. WALSH, President of the Illinois State Federation of Labor, AFL-CIO, and JAMES CLARIN,	)	
Plaintiffs,	)	
-v-	)	No. 90 C 1724
UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, as Secretary of the United States Department of Commerce; MICHAEL R. DARBY, as Under Secretary for Economic Affairs of the United States Department of Commerce, Bureau of the Census, GEORGE H. W. BUSH, as President of the United States; and DONALD K. ANDERSON, as Clerk of the United States House of Representatives,	)	
Defendants.	)	

MEMORANDUM OPINION

This proposed class action has wended a tortuous path through the district court, passing through three separate courtrooms during which time the defendants filed a motion to dismiss, before finally landing here. The parties briefed the motion to dismiss, but this court determined that it would be premature to consider that motion without having first decided whether to certify the proposed class. The parties subsequently briefed that question and the court is now prepared to rule on each issue.

1. Background

Plaintiffs filed this action seeking injunctive relief against the Census Bureau, among others (the court will refer throughout this opinion to all the

defendants, collectively, as the Census Bureau or the Bureau). The plaintiffs allege that they, and many others similarly situated, have been and will be, in the absence of judicial intervention, "chronically undercounted": in the decennial census of 1990. They include in the category of "chronically undercounted" racial and ethnic minorities including African-Americans and Hispanics; documented and undocumented aliens; homeless people; people who do not read or speak English well; and people living in poverty or in high crime areas in both urban and rural communities. Plaintiffs allege that, as a consequence of the Census Bureau's failure to adequately count them, their right to political representation at federal, state and local levels has been impinged. Furthermore,

the inaccurate count harms all of Illinois (they do not make any allegations about the existence of "chronically undercounted" people in other states) since, they allege, a great deal of federal financial aid is allocated on the basis of the census count.

Plaintiffs want the Census Bureau to promise to take measure to correct the anticipated undercount in the 1990 census.[1]

The Census Bureau attempted to settle litigation pending in the Eastern District of New York (New York v. U. S. Dept. of Commerce, case no. 88 CV 3474)[2] by

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[1] The Census Bureau has released preliminary figures, it has not, however, decided yet whether to correct for a possible over- or under-count.

[2] For a discussion of some of the issues raised in that case, see 739 F. Supp. 761 (E.D.N.Y. 1990).

promising to consider whether to make statistical adjustments for an anticipated undercount. On March 12, 1990, pursuant to the settlement, the Bureau released the Guidelines which would govern its decision on the matter. The plaintiffs think those guidelines will not adequately correct the undercount they anticipate and they want this court to certify a class of plaintiff and order the Census Bureau to take various measures to correct the anticipated undercount in the 1990 census. Among other things, they want the Bureau to conduct a post-enumeration survey of at least 150,000 household and use "the most accurate correction methods available" to correct the 1990 undercounts.

2. Class Certification

The plaintiffs would like this court

to certify a class of "all Illinois residents, or, in the alternative, all Illinois resident residing in census blocks in which members of the "chronically undercounted" -- including Blacks and/or African-Americans, Hispanics, racial and ethnic minorities, documented and undocumented aliens, homeless persons, persons who do not read or speak English [well], and persons living in urban and rural poverty or high-crime areas -- reside." This court is obligated, pursuant to Fed.R.Civ.P. 23 (c)(1), to decide whether plaintiffs may maintain their suit as a class action "as soon as practicable after the commencement of [the action]." The words "as soon as practicable" mean that the court must decide whether to certify the class before it acts on any dispositive motions. See

Bieneman v. City of Chicago, 838 F.2d 962, 963 (7th Cir. 1988). The court therefore ordered the plaintiff to formally move for class certification, and the parties have fully briefed the motion. In accordance with the Seventh Circuit's directive in Bieneman, this court will consider the motion for class certification before turning to the motion to dismiss.

Rule 23 furnishes the guidelines which this court must consider in deciding whether to certify a class. It provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Certification is inappropriate unless the court finds that the plaintiffs have met each of these requirements. Because the court finds that the plaintiffs' have not presented questions of fact or law which would be common to either of the proposed classes, it need not address the remaining Rule 23 (a) criteria.

Common Questions

The second Rule 23(a) question is whether plaintiffs have demonstrated that the significant questions of law or fact which their own claims raise are common to those which would be raised by the proposed class. See Johnson v. Baldinger, No. 89 C 2138, slip op. at 5 (N.D.Ill. April 19, 1990), found at 1990 U.S. Dist. Lexis 4596. The legal and factual questions plaintiffs raise are: whether they have standing to bring their claims;

whether they are entitled to the relief they have requested; and whether their claim that certain groups of people are "chronically undercounted" is in fact true. Plaintiffs have proposed a class consisting of all Illinois residents, arguing that an inaccurate count of Illinois' population effectively harms everyone in the state, to the extent state and federal benefits are allocated according to the census. That may be true as far as the federal government is concerned. Congress uses the count in deciding how to allocate federal funds among the states -- fewer people means fewer dollars for the state as a whole. The count is also used, in comparison with the count of residents of the remaining states, to determine the number of Congressional representatives to which

Illinois citizens are entitled.

The plaintiffs proposition that an undercount hurts everyone in the state is less likely true, however, when the harm in issue is the availability of state resources. An undercount in some census blocks (and plaintiffs alleges that the "chronically undercounted" are concentrated in certain specific blocks) benefits residents of other blocks, since they will then receive a bigger slice of the state benefit pie.

Plaintiffs argue that to the extent the interests of residents of other blocks are adverse to plaintiffs', they are illegitimate (no one, argue the plaintiffs, has a legitimate interest in an inaccurate census count, or the benefits they might derive from such a count). While this may be true, it is not

an accurate characterization of the interests at stake here. Plaintiffs are seeking a reallocation based upon demographic hypotheses and statistical assumptions which are not universally accepted (indeed, that is why this suit has become necessary). Whether or not plaintiffs are ultimately vindicated, their proposed "correction" of the census data could potentially harm other residents of the state. Those persons' interests are, legitimately, adverse to the plaintiffs.[3]

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[3] The court notes that the people plaintiffs want to include in their proposed class are not the only ones who may have been undercounted in the most recent census. The Chicago Tribune discovered that a serious undercount had occurred in the affluent Lincoln Park area in Chicago. Laurie Goering et al., Checkup finds Some Didn't Count in Census, Chicago Tribune, News Section p. 1 (July 18, 1990). The allegations of a national undercount are also widespread, and cover a wide spectrum of socio-economic strata.

Plaintiffs have proposed an alternative class which they argue would alleviate this problem. They propose that, if this court declines to certify a class of all Illinois residents, it should certify a class of the residents of the census blocks in which the "chronically undercounted" reside. Those people would be harmed at both the state and federal levels by the alleged undercount.

Plaintiffs' proposal does not entirely solve the problem because plaintiffs have not identified the census blocks in which the "chronically

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Indiana alleges that the Bureau missed 7,000 Indiana University students living in dormitories; Mississippi contests a count of its resident which indicates that the population increased by about 13,000, while jobs in the state increased by over 125,000. See Mitchell Locin, Time's up, Census Bureau Says No Deadline Extension for Cities Efforts to Add to Count, Chicago Tribune, Chicagoland Section, p. 3 (September 26, 1990).

undercounted" reside, nor provided the court with any principled way of deciding which blocks should be included in the category. By plaintiffs' own allegations, the division cannot be made upon the basis of earlier census data, since that data also failed to adequately account for the "chronically undercounted". The plaintiffs have failed to address this fundamental problem of class definition, and the court cannot certify the class unless it is resolved.[4]

Because the plaintiffs have not told the court how they would identify the

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[4] The court recognizes that plaintiffs are not required to exactly specify the membership of their proposed alternative class. See Marcial v. Coronet Insurance Co., 880 F.2d 954, 957 (7th Cir. 1989). Plaintiffs' allegations, however, are too vague to permit any principled evaluation of the class membership, and as a result the court cannot accept them.

"chronically undercounted" census blocks, and because a state-wide class would not present common questions but rather, would join as plaintiffs parties with adverse interest, this court must deny plaintiffs' motion for class certification. The court accordingly turns to the defendants' motion to dismiss the case.

3. The Motion to Dismiss

The defendants advance three arguments in support of their motion to dismiss the complaint. First, that plaintiffs' claims are not ripe for review -- the census not having been officially completed yet; second, that the plaintiffs present a non-justiciable, political question and; finally, that the plaintiffs lack standing to pursue this action.[5]

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[5] The court notes that since this case arrive here, the Census Bureau has released preliminary population counts.

The court first notes that similar litigation pending in New York has led to the entry of a stipulation between the parties, pursuant to which the Census Bureau agreed to, and did, formulate guidelines which will direct its decision whether to conduct a statistical adjustment of the final census figures to compensate for the over- or under-counting of certain groups (essentially, the same groups the plaintiffs in this case seek to represent). After the Census Bureau issued its guidelines, the plaintiffs in the New York case went back to court, arguing that the bureau was not in compliance with the stipulation. See New

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See Exhibits A and B to Defendants' Response to Plaintiffs' Motion to Expedite (letters transmitting figures to President Bush and to the Illinois Governor and legislators).

York v. U. S. Dept. of Commerce, 739 F. Supp. 761 (E.D.N.Y. 1990). The district court held that a challenge to the census enumeration was justiciable and that the question whether the guidelines violated the stipulation was ripe for review. See Id. at 764-68. The court ultimately upheld the guidelines promulgated by the Census Bureau.

This court is not as certain as the district court in New York that the plaintiffs' challenge to the census presents a justiciable question. Before delving too deeply into the issues, the court notes the 'catch-22' presented by plaintiffs' arguments. The plaintiffs' claim, in part, is that the Census Bureau's failure to correctly count them leads to their inability to adequately represent themselves politically (the

count is the basis, either by statute or in practice, for the apportionment of representatives at federal, state and local levels). Should this court find that question to be a non-justiciable 'political' question, then plaintiffs will be left to their political remedy--a remedy they claim is not truly available to them, which is why they filed suit in the first place.

On the other hand, should this court vindicate plaintiffs' claims, then some other state or group of people will suffer. Just as this court could not certify a class of all Illinoisans because of the legitimate adverse interests of the various citizens of the state, so are the interests among the various states adverse. At least at the federal level, the upward 'correction' of the Illinois

count can only harm one or more of the rest of the states. The House of Representatives has a fixed number of seats--435--which are apportioned, according to the census, among the states. If Illinois gains a seat, then another state must lose one--a 'zero-sum game'. Yet none of the other states, any one of which could be adversely affected by the outcome of this litigation and any one of which might also be undercounted, is a party here.

To further complicate the problem, the court has already noted that the Census Bureau is subject to litigation regarding the conduct of the 1990 census in at least one other jurisdiction. See New York v. U. S. Dept. of Commerce, 739

F.Supp. 761.[6] The adjudication of this case presents the very real and substantial risk of inconsistent judgments. The Census Bureau could very likely be required to do one thing in New York and quite another in Illinois. This does not bode well for the plaintiffs' stated goal of a more accurate census.

In Carey v. Klutznick, 653 F.2d 732, 737-38 (2d Cir. 1981) (Carey 3) the Second Circuit addressed some of these issues.[7]

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[6] Among the plaintiffs in that litigation are: the city of Chicago; the city of Los Angeles; Dade County, Florida; the National Conference of Mayors; the National League of Cities; the League of United Latin American Citizens; and the National Association for the Advancement of Colored People.

[7] Carey 3 was the last in a series involving a challenge to the 1980 decennial census. The plaintiffs charged mismanagement in the Census Bureau, leading to a significant miscount. The district court granted a preliminary injunction, requiring the Census Bureau to compare a list of names submitted by the

Although the district court had already decided (and the Carey 2 panel affirmed) that the parties had standing and their claim about the conduct of the census justiciable, the Carey 3 panel offered some alternatives which the district court might have (and, according to the Carey 3 panel, should have) utilized. While the panel in Carey 3 did not expressly criticize the Carey 2 panel's opinion, it did note that the parties and the court

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plaintiffs with its own records in order to identify individuals not counted in the 1980 census. See Carey v. Klutznick, 508 F.Supp. 416 (S.D.N.Y.) (Carey 1). The appellate court affirmed the injunction and held that the plaintiffs had standing to bring their claims and that they had presented a justiciable question. Carey v. Klutznick, 637 F.2d 834 (2d Cir. 1980) (Carey 2). After the case returned to the district court, the court ordered the Census Bureau to adjust its population figures for New York. The Census Bureau appealed again, leading to the opinion cited above, Carey 3.

could have accommodated the shared interest of the several states in an accurate enumeration in a number of other ways. The first was "to substitute Bureau and congressional review for that of the court." The second, "to require that notice of suit be given to all of the States, with permission to intervene given any State which felt that its interests were imperiled." Third, "to seek multidistrict coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407." Finally, the district court could have "stayed its judgment pending a definitive appellate ruling as to whether the Census Bureau's conduct of the ... census could properly be challenged in fifty separate and unrelated actions...."

The most attractive judicial resolution, from this court's perspective,

would have been the referral of the matter to the Panel on Multidistrict litigation. But the court is not authorized to initiate proceedings to transfer cases. Only the panel itself or one of the parties to this or the New York action may do so. See 28 U.S.C. § 1407(c)(i) and (ii). No referral appearing to be forthcoming, this court must consider the other alternatives available to it.

Another suggestion the panel in Carey 3 made was that the district court order the parties to notify all of the States, and grant those with an interest in the litigation to intervene. That solution is not practicable here because, as the court noted, a court in at least one other state has already reached a partial resolution of the issue before this court--but more on that below. Enough to note here that

the alternative is not practicable.

Accordingly, the court returns to the question with which it began--justiciability. Although alternatives were available to the parties which could have avoided a decision on that point, they have chosen not to take them and this court is therefore squarely confronted with the issue.

As the court noted above, the plaintiffs have presented the issue as a 'catch 22' (although not in those terms). In fact, however, that analogy is false. Even if plaintiffs' allegation that the groups they represent are not only "chronically undercounted", but are significantly less counted than other groups (see n. 3 above) is true, they are not left without any political remedy. There is no reason to believe that if

these people are undercounted (and this court does not discount that possibility), the problem is unique to Illinois. Rather, any state whose residents include racial and ethnic minorities, documented and undocumented aliens, homeless people, people who do not read or speak English well, or people living in poverty or in high-crime areas, would likely suffer similar problems in obtaining an accurate count. The interest of many, if not all of these people, are represented to some extent in Congress.

Among the members of the House of Representatives are members of various racial and ethnic minorities as well as people from urban and rural high-crime areas. Furthermore, Congress has, in the recent past, addressed the problems faced

by documented and undocumented aliens,[8] people who have difficulty with the English language,[9] and the homeless.[10] While an undercount is undoubtedly an evil to be avoided, it does not necessarily mean that the people who are not well counted are without any political remedy

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[8] See, for example, 18 U.S.C. § 242, which provides: "Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant [of the United States] to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien ... than are prescribed for the punishment of citizens, shall be fined ... or imprisoned ... or both ....

[9] See 42 U.S.C. § 1973aa, setting forth, among other things, bilingual voting requirements and providing for voting assistance for blind, disabled or illiterate persons.

[10] See, for example, the Homeless Assistance Act, 42 U.S.C. § 11301 et seq. (1990).

whatsoever.

Furthermore, the court notes that the only questions before it is whether the Census Bureau is doing what it should in order to obtain the most accurate count practicable. No districts have been drawn, no benefits cut, no actual harm yet suffered by the plaintiffs. This is not a case where the plaintiffs have lost political representation, but rather one in which they fear (perhaps with some justification) the loss. The question is which of the coordinate branches of government is best equipped to deal with plaintiffs' concern.

The plaintiffs in Baker v. Carr, 369 U.S. 186 (1962), presented concerns similar to plaintiffs', but they challenged a legislative districting plan, rather than the census. The Baker

plaintiffs complained that the Tennessee legislature had diluted their right to vote by failing to reapportion legislative districts for almost fifty years--during which time the population of the state had nearly doubled and concentrations of eligible voters had shifted. The plaintiffs went to court with their claim that the legislature's inaction violated their constitutional right to equal protection of the laws, as well as their rights under the Tennessee constitution. Although the defendants argued (and the district court held) that plaintiffs had presented a non-justiciable, political question, the Supreme Court differed. In explaining its holding, the Court also examined and clarified the boundaries of the political question doctrine.

The court stated that:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

After an extensive review of its prior cases dealing with the doctrine, the

court reiterated that a political question is one which a coequal branch of government has or will decide[d]; or which presents the risk of embarrassing the United States government abroad, or causing grave disturbance domestically; or one which requires the court to "enter upon policy determinations for which judicially manageable standards are lacking." Id. at 226. It cautioned that:

> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of

> resolution by any semantic cataloguing.

Although the Court has applied the Baker v. Carr 'political question' test in a number of cases since it decided that case, see e.g. Reynolds v. Sims, 369 U.S. 186 (1964) and Davis v. Bandemer, 478 U.S. 109 (1985), it has not altered the doctrine. It has also not applied that doctrine to a case in which the plaintiffs challenged the conduct of the census.

This case has nearly all the characteristics which the Supreme Court has held are hallmarks of non-justiciable political questions. First, and most importantly, the Constitution specifically delegated the census authority to the Congress.[11] Congress has delegated much

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[11] Article 1, § 1 provides: "All legislative Powers herein granted shall be vested in a Congress of the United States ...." Section 3 of the same

of that Constitutional authority to the Census Bureau, which has, as this court has noted so far a number of times, made a number of policy decisions about how to achieve the best count practicable. Pursuant to the New York settlement, the Bureau has further agreed to evaluate a number of factors when it decides whether to adjust the census. While the Constitutional delegation of census authority to Congress does not necessarily take this case out of the courts' jurisdiction it is nonetheless an important factor to consider in evaluating

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Article states: "Representative and direct Taxes shall be apportioned among the several States which may be included within this union, according to their respective Numbers .... The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct." (Emphasis added).

whether the case, as a whole is justiciable.

Furthermore, plaintiffs' complaint specifically invites the court to "enter upon policy determinations for which judicially manageable standards are lacking." As the court noted at the outset, the plaintiffs have requested that this court 'second-guess' the Census Bureau's judgment about the proper manner in which tc conduct the census. Everyone concedes that an accurate headcount is a goal, but not a practical possibility. That being the case, the question is how to most fairly adjust for the undercount.

This is purely a policy determination. The fact that some 'statistical adjustment' may be called for does not make the resolution of the issue any easier. The parties agree, and indeed

they are here because, there is no single, universally accepted statistical manipulation which will magically correct the census count. The choice of one statistical method over another must be made according to criteria which the judiciary is not best suited to evaluate. Each of the available methods has its own advantages and disadvantages and the body best equipped to choose one over the other is that which is vested with authority to decide policy -- Congress, through the Census Bureau. That, perhaps is why the Constitution specifically delegates the census authority to Congress, rather than the courts. Clearly, this case presents a non-justiciable political question within the parameters set in Baker v. Carr.

In essence, what the plaintiffs are asking this court to do is to review, and

modify, the settlement agreement approved by another district court. Even if this court were inclined to make the policy determinations the plaintiffs call for, it clearly is not authorized to act as an appellate court to another court of equal jurisdiction. This dilemma illustrates the inherent problems with allowing several (perhaps any) courts to consider the same or similar question as concerns a single defendant.

Plaintiffs had other options. They chose to forego them. This court finds that the questions whether and how the Census Bureau should adjust its 1990 census is nonjusticiable at this time. Furthermore, the risk that permitting this litigation to proceed would result in the imposition of inconsistent judgments upon the Census Bureau is an insurmountable

obstacle to its continuance. Fed.R. Civ.P. 1 provides that the rules of civil procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." None of these three goals would be met by permitting this litigation to continue. This court therefore grants the defendants' motion to dismiss the complaint.

3. The Motion To Intervene

Finally, the State of Illinois has moved to intervene in the action. Because this court has granted the defendants' motion to dismiss the complaint, the court denies the motion to intervene.

Conclusion

The court denies plaintiffs' motion for class certification, grants defendants' motion to dismiss, and denies

the State of Illinois' motion to intervene.

ENTER:

BRIAN BARNETT, DUFF, JUDGE
UNITED STATES DISTRICT COURT

DATE: March 12, 1991

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 91-2051
ROBERT L. TUCKER,

Plaintiffs-Appellants,

-Vs-

UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, as Secretary of Commerce; MICHAEL R. DARBY, as Under Secretary for Economic Affairs; BUREAU OF THE CENSUS; BARBARA E. BRYANT, as Director of the Bureau; GEORGE H. W. BUSH, as President of the United States; and DONALD K. ANDERSON, as Clerk of the United States House of Representatives,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 90 C 1724 - **Brian Barnett Duff**, *Judge*

ARGUED JANUARY 8, 1992
DECIDED MARCH 16, 1992

Before CUMMINGS, POSNER, and RIPPLE, *Circuit Judges.*

POSNER, *Circuit Judge*. This is a suit by residents of Illinois against the federal executive-branch officials responsible for the decennial census, and also against the Clerk of the House of Representatives. The complaint charges that the 1990 census, by undercounting blacks, Hispanics, illegal aliens, and poor people generally, has violated countless constitutional and statutory provisions, including the constitutional clause governing the apportionment of congressional representation and federal taxes (Art. I, § 2, cl. 3), the statutes that implement that clause (2 U.S.C. § 2a(a) and 13 U.S.C. § 141), the Fourteenth Amendment, the Voting Rights Act (42 U.S.C. § 1973), and the Administrative Procedure Act (5 U.S.C. §§ 551 *et seq.*). The plaintiffs claim that these violations

have caused them to lose representation in the House of Representatives and a fair share of federal and state funds allocated on the basis of the census figures. They seek an injunction to compel the responsible officials to make an appropriate statistical adjustment for the undercount. The district court dismissed the suit on the pleadings as barred by the "political questions" doctrine. Baker v. Carr, 369 U.S. 186 (1962); Gilligan v. Morgan, 413 U.S. 1 (1973).

The decennial census is a headcount rather than an estimation based on sampling. Nowadays it is conducted mainly by mail, but many people fail to return the form and the census takers must visit them personally. Carey v. Klutznick, 508 F. Supp. 420, 422-29 (S.D.N.Y.), aff'd, 637 F.2d 834 (2d Cir. 1980); Dan Halacy,

Census: 190 Years of Counting America 157-77 (1980). The census takers try to account for everybody in America but of course they don't succeed, and they have particular difficulty finding people who lack a fixed abode or mailing address or who want to avoid contact with any representatives of government; in addition, they are doubtless less than completely thorough in canvassing residences in dangerous neighborhoods. If the resulting undercount were randomly distributed across communities, there would be no effect on representation and little effect on the allocation of government largesse. (Little rather than zero because eligibility for some programs depends on a community's population, and even an unbiased undercount might drive the population figure below the threshold.

City of Camden v. Plotkin, 466 F. Supp. 44, 48 (D.N. J. 1978); Arthur J. Maurice & Richard P. Nathan, "The Census Undercount: Effects on Federal Aid to Cities," 17 *Urban Affairs Q.* 251, 265 (1982).) There is reason to believe, however, that the undercount is not randomly distributed, but instead is concentrated in the poor, among whom blacks and Hispanics are disproportionately represented, and among illegal aliens, who are disproportionately Hispanic. *Carey v. Klutznick, supra*, 508 F. Supp. at 426; *Young v. Klutznick,* 497 F. Supp. 1318, 1327-28 (E. D. Mich. 1980), rev'd, 652 F.2d 617 (6th Cir. 1981); Kirsten K. West & David J. Fein, "Census Undercount: An Historical and Contemporary Sociological Issue," 60 *Sociological Inquiry* 127, 129 (1990); Note, "Demography and Distrust:

Constitutional Issues of the Federal Census," 94 *Harv. L. Rev.* 841, 849-52 (1981); Staff of the Subcomm. on Census and Population of the H. Comm. on Post Office and Civil Service, 96th Cong., 2d Sess, *Report on the 1980 Decennial Census* 56 (1980); U.S. Comm'n on Civil Rights, *Counting the Forgotten: The 1970 Census Count of Persons of Spanish-Speaking Background in the United States* (G.P.O. 1974).

The Census Bureau acknowledges all this-specifically, acknowledges an undercount in the 1990 census ranging from 1.7 percent of whites to 5.2 percent of Hispanics, *Adjustment of the 1990 Census for Overcounts and Undercounts of Population and Housing: Notice of Final Decision*, 56 Fed. Reg. 33582 (July 22, 1991), and in response to parallel

litigation in the Second Circuit agreed to conduct a comprehensive review of the undercount problem, *City of New York v. United States Dept. of Commerce*, 739 F. Supp. 761, 763-64, 769 n. 9 (E.D.N.Y. 1990). It conducted the review with the aid of a panel of outside statistical experts, but concluded (in 60 pages of fine print in the *Federal Register*) that the census figures should not be adjusted to correct for the undercount. *Adjustment of the 1990 Census for Overcounts and Undercounts of Population and Housing: Notice of Final Decision, supra*. The Bureau explained that while adjustment by the best method available would increase the census totals, it would not significantly alter the apportionment of seats in the House of Representatives among the states, in part because there is

overcounting as well as undercounting.

After the dust settled, Illinois's representation would be unchanged, although California and Arizona would pick up a few seats at the expense of Pennsylvania and Wisconsin. Federal grant allocations might not be much affected either. Maurice & Nathan, *supra*. Moreover, any attempt to make a statistical adjustment to the mechanical headcount would, by injecting judgmental factors-and ones of considerable technical complexity to boot, Allen L. Schirm & Samuel H. Preston, "Census Undercount Adjustment and the Quality of Geographic Population Distributions," 82 *J. Am. Stat. Ass'n* 965 (1987)-open the census process to charges of political manipulation. And while a statistical adjustment for the undercount would undoubtedly improve the

accuracy of the nationwide census total, there is no consensus among statisticians and demographers that it would make the state and district census totals-the level at which the adjustment would actually affect representation and funding-more accurate. This lack of consensus feeds the concern with a possible loss of public credibility as a consequence of departing from the (perhaps delusive) simplicity of counting heads.

The plaintiffs disagree with all this and, for all we know, they may be right, but we agree with the district judge that the federal courts have not been authorized to arbitrate the dispute. It should go without saying that federal judges cannot provide a solvent for every social problem or a remedy for every questionable act of government. We cannot

provide a remedy for a census undercount, at least where the undercount is not the result of an effort to reduce some group's representation or funding but is merely an accident of the census-taking process.

To see this we must be clear about what the plaintiffs do and do not claim. They argue that the undercount harms groups that the equal protection clause of the Fourteenth Amendment protects against discrimination by the states, such as blacks and Hispanics, and they point out correctly that the due process clause of the Fifth Amendment, interpreted in light of the subsequently enacted equal protection clause of the Fourteenth Amendment, forbids such discrimination by the federal government. *Bolling v. Sharpe*, 347 U.S. 497 (1954). But the only discrimination forbidden by these

provisions is *intentional* discrimination. Disparate impact, which means the unintended consequence of measures adopted for reasons unrelated to any intention to discriminate, is not, under the Supreme Court's current interpretation of the constitution, an acceptable basis for a finding of *unconstitutional* discrimination, whatever the significance of such a showing may be under the civil rights statutes. *Washington v. Davis*, 426 U.S. 229, 239-45 (1976); *City of Mobile v. Bolden*, 446 U.S. 55, 66-68 (1980). The plaintiffs do not argue that by refusing to adjust the census count the defendants are guilty of intentional discrimination- are prejudiced against blacks, or Hispanics, or aliens (or for that matter the poor, although they are not a protected class under the Constitution as

it is at present interpreted, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973)), or want to deprive members of these groups of equal representation or equal public funding, or even that the defendants want to undercount these people. The plaintiffs accept the bona fides of the Census Bureau and the inevitabiliity of an undercount and merely disagree with the Bureau's judgment that making a statistical adjustment to the raw headcount would create problems disproportionate to the benefits.

The plaintiffs cannot be serious in arguing that the refusal to adjust the headcount violates the Voting Rights Act. That Act provides remedies only against "any State or political subdivision" of a state. 42 U.S.C. § 1973; and see §§ 1973a

to 1973dd-5. The Fourteenth Amendment is likewise limited to state action. The plaintiffs' invocation of these enactments is a throwaway. They do seem to be serious, however, in arguing that Congress has violated Article I, section 2, clause 3 of the Constitution, which provides that representatives "shall be apportioned among the several States . . . according to their respective Numbers," by basing the apportionment on census figures uncorrected for the undercount. It is this argument, presumably, that explains why the complaint names the Clerk of the House of Representatives as a defendant. *Montana v. United States Dept. of Commerce,* 775 F. Supp. 1358 (D. Mont. 1991) (3-judge court), prob. juris, noted, 60 U.S.L.W. 3429 (U.S. Dec. 17, 1991), holds on grounds unrelated to the accuracy

of the 1990 census that the method used by Congress to apportion congressional seats violates the apportionment clause.

The plaintiffs' argument is an extension of the congressional reapportionment cases, notably *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), which found "one man, one vote" implicit in the apportionment clause plus another provision of Article I, section 2-that representatives shall be chosen "by the People" (cl. 1). The Fifth Amendment, too, might be thought, by analogy to the decisions invalidating the malapportionment of state legislatures under the equal protection clause, to require the federal government to apportion congressional seats among the states in accordance with an accurate estimate of the number of people in each

state. *Gray v. Sanders,* 372 U.S. 368, 379 (1963); *Reynolds v. Sims,* 377 U.S. 533, 577 (1964). For those cases do not place on plaintiffs any burden of proving that a malapportionment represents a deliberate effort to dilute some group's voting power. It is enough that the state's electoral districts *are* malapportioned. We assume that those cases survive the later ones, such as *Washington v. Davis, supra,* that require proof of intentional discrimination. The purpose of *that* requirement is to prevent the concept of equal protection from being used to invalidate governmental policies that just happen to bear more heavily against a vulnerable group, whereas the reapportionment cases vindicate a right that the Supreme Court has found to be implicit in the Constitution to an

apportionment mechanism that will, so far as possible, give each person's vote the same weight in an election. A state's failure to create the required mechanism is an intentional denial of the right to an equally weighted vote. And while the poor are not a protected class in the sense that the Fourteenth Amendment entitles them to complain about policies that fail to alleviate their plight, government cannot use wealth to discourage voting, as through a poll tax or property qualifications. *Harper v. Virginia Board of Elections,* 383 U.S. 663, 668 (1966); *Cipriano v. Houma,* 395 U.S. 701 (1969) (per curiam). By doing so it does not discriminate necessarily but it does place a burden on a right-the right to vote, and derivatively the right to an equal vote-that the Supreme Court has found in

various provisions of the Constitution.

The plaintiffs' main argument, however, is different from any we have mentioned. It is derived from a constitutional right neither to equal voting power nor to freedom from governmental discrimination, but to census accuracy. The argument is that the Census Bureau (not Congress or the President) has violated the apportionment clause of the Constitution, the census statutes, and the Administrative Procedure Act, all of which (in the plaintiff's view) implicitly command the Bureau to make whatever adjustments in the raw census totals are necessary to make the census the best feasible estimate, albeit not an actual count (because a perfectly accurate count of upwards of 250 million people isn't feasible), of the American population.

We have our doubts whether, as the district judge believed, the political questions doctrine is a bar to such a suit. The scope, rationale, provenance, and legitimacy of the doctrine remain profoundly unclear. *Paul M. Bator et al., Hart and Wechsler's The Federal Courts and the Federal System 288-94* (3d ed. 1988); David P. Currie, *Federal Jurisdiction in a Nutshell 26-30* (3d ed. 1990); 13 A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3524.1, at p. 492 (1984). Perhaps after such cases as *Baker v. Carr* and *Davis v. Bandemer*, 478 U.S. 109 (1986), all that is left is the unexceptionable proposition-undeserving of the dignity of a special doctrine-that the federal judiciary is not permitted to adjudicate questions that the Constitution has placed within the

exclusive jurisdiction of another branch of government, or to disregard traditional limitations on equitable relief. See Herbert Wechsler, *Principles, Politics and Fundamental Law 11-14* (1961); Louis Henkin, "Is There a Political Question Doctrine?" 85 *Yale L.J.* 597 (1976). The accuracy of the decennial census is not, in any sense apparent to us, one of those questions; nor are the plaintiffs asking for a form of relief that would exceed the bounds of traditional equity power. And whatever the current scope of the political questions doctrine may be, we would have difficulty squaring the application of the doctrine to this case with its rejection in the apportionment cases. Not that this is an apportionment case, or governed by those cases; it is not, as we shall see; but the political

sensitivities that might have been thought to bring the apportionment cases within the scope of the political questions doctrine, but did not, are no greater here.

Nor do the plaintiffs lack standing, in the Article III sense, to maintain this suit. All they need show in order to demonstrate an Article III case or controversy is, as we have emphasized recently, some probability of a tangible benefit from winning the suit. *Wooten v. Loshbough*, 951 F.2d 768, 769 (7th Cir. 1991); *Morales v. Yeutter*, 952 F.2d 954, 956 (7th Cir. 1991); *Harris v. Board of Governors,* 938 F.2d 720, 723 (7th Cir. 1991); *North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1242 (7th Cir. 1991). There is that here. Even if the adjustment that the Census Bureau considers best would not

benefit residents of Illinois because it would not increase the state's seats in the House of Representatives, another adjustment, which a court at the urging of these plaintiffs might think better, might do that. And there is no doubt that, as a matter of fact, the allocation of state and federal funds is heavily influenced by census figures, and for all we know an adjustment in those figures might benefit residents of Illinois disproportionately. Or might not-but the litigation hasn't been allowed to proceed to the point where the plaintiffs would be required to specify the adjustment they seek, and until then it cannot be determined that they have nothing to gain from winning the case. In *Federation for American Immigration Reform v. Klutznick,* 486 F. Supp. 564 (D.D.C. 1980) (three-judge

court), in contrast, where standing was denied, the plaintiffs *had* specified the adjustment they wanted-exclusion of illegal aliens-yet had failed to show that they would derive any benefit from the adjustment. And in *Young v. Klutznick*, 652 F.2d 617, 624-25 (6th Cir. 1981), another case that rejected on grounds of standing a challenge to the census count, the injury that the plaintiffs claimed to have suffered involved congressional redistricting within a state rather than the allocation of representation across states, and the court pointed out that state legislatures are not required even to use census data in redistricting.

Were courts to insist, as a condition of standing, on proof that a census recount really would help a plaintiff, even a challenge to a malapportioned

legislature might fail on grounds of standing, since the actual consequences of reapportionment for the welfare of particular classes of voter or of resident remain, after many years of study, obscure. Timothy G. O'Rourke, *The Impact of Reapportionment* 159 (1980); Larry M. Schwab, *The Impact of Congressional Reapportionment and Redistricting* 196-200 (1988). Maybe the present suit is merely political grandstanding, but there are tangible stakes in *some* census disputes, even though it is many years since officials of St. Paul, Minnesota kidnapped census takers working in Minneapolis and charged them with overcounting. Maurice & Nathan, *supra*, at 251. It is too early to conclude that there are no tangible stakes in this case.

But there are other senses of

standing besides the Article III sense. One requires a plaintiff to be an *intended* as distinct from an accidental plaintiff. Not everyone hurt by a violation of a constitutional or statutory provision can sue to redress the violation. What we may call the "intended plaintiff" doctrine has two elements, each of which an aspiring plaintiff must satisfy. One, which in this case is critical, is that he must show that he is within the class of persons who have been given a right to *litigate* the violation. *Block v. Community Nutrition Institute,* 467 U.S. 340 (1984); *Clarke v. Securities Industry Ass'n,* 479 U.S. 388, 399-400 (1987); cf. *O'Bannon v. Town Court Nursing Center,* 447 U.S. 773 (1980). This branch of the intended plaintiff doctrine is what prevents a farmer from suing the Weather

Bureau for failing to have the best forecasting equipment and methodology, even if he can show that he is injured by the failure and even though the failure if sufficiently egregious could be thought an arbitrary and capricious agency action violative of the Administrative Procedure Act, 5 U.S.C. § 551. No court would permit such a suit to go forward. It would say that the Administrative Procedure Act did not contemplate judicial review of *that* sort of agency action and therefore that the plaintiff had not been "aggrieved" by it within the meaning of 5 U.S.C. § 702.

We must distinguish the problem of standing presented by our hypothetical Weather Bureau case from the more familiar problem, involving the other part of the intended-plaintiff doctrine, that is

presented when a plaintiff, however suitable to be a litigation standard bearer he might otherwise be, is not within the class of persons that Congress *intended to be benefited by* the statute under which he sues. *North Shore Gas Co. v. EPA, supra,* 930 F.2d at 1243-44, and other cases cited there; Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy: Problems, Text and Cases* 1120 (2d ed. 1985). The reason for denying standing in our hypothetical case would not be that the activities of the Weather Bureau are not intended for the benefit of our hypothetical farmer - they are. It would be that multitudinous lawsuits by victims of bad weather would be a lunatic method of trying to improve the accuracy of weather forecasting. Cf. *Clarke v. Securities Industry Ass'n,*

supra, 479 U.S. 399; *Block v. Community Nutrition Institute*, *supra*, 467 U.S. at 348. We would say that the statutes establishing and governing the Weather Bureau should not be understood to confer *litigable* rights on persons complaining of being injured as a result of inaccurate weather forecasts, although those statutes were intended to *benefit* those persons.

The failure to count a person in the census enumeration may be a graver failure of good government than the Weather Bureau's failure to keep up with the latest techniques of weather forecasting. The plaintiffs' counsel reminded us at argument that ever since the original Constitution provided that slaves would be counted for representation purposes as three-fifths of free persons, undercounting has been—a politically and

morally sensitive issue, even though the purpose of the provision was not to denigrate blacks but to reduce the congressional representation of their white masters. Yet the question remains whether the various provisions invoked by the plaintiffs should be construed to authorize suits for judicial review of inaccurate census determinations, and our answer is of inaccurate census determinations, and our answer is no. The decennial census is a part-maybe the most important part, but a part nevertheless-of a vast federal activity of collecting and publishing statistics. Every methodological decision made in the government's statistical programs has a potentially adverse impact on some, perhaps many, persons. Industry concentration ratios compiled by the

Census Bureau are used in antitrust cases. See, e.g., *United States v. Continental Can Co.*, 378 U.S. 441, 459 n. 10 (1964). The Consumer Price Index, which is compiled by another federal statistical agency, the Bureau of Labor Statistics, is incorporated by reference in innumerable contracts that contain cost of living provisions. See, e.g., *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 538 (1983). Financial statistics published by various federal agencies are likewise often incorporated by reference in contracts. Racial statistics collected by the Census Bureau are used as evidence in employment discrimination cases. See, e.g., *Hazelwood School District v. United States,* 433 U.S. 299, 303 (1977). Since corporations use population statistics when making plans about future office and

plant locations, census statistics can affect the distribution of employment opportunities. Note, Constitutional Implications of a Population Undercount: Making Sense of the Census Clause," 69 *Geo. L. J.* 1427, 1432 n. 34 (1981). Why, there may even be people who have relied to their detriment on misinformation contained in "Gloves and Mittens" 1988," listed in the Census Bureau's *Census Catalog & Guide 1991*, at p. 120. Forget mittens; it would be absurd to suppose that a person who had an employment contract that contained a cost of living clause could sue the Department of Labor, arguing that the Department had, by measuring the cost of living inaccurately, cost him a raise. But that is what the logic of this lawsuit implies.

It might be different if the

apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a judicially administrable standard. There is nothing of that sort, and the inference is that these enactments do not create justiciable rights. The Constitution directs Congress to conduct a decennial census, and the implementing statutes delegate this authority to the Census Bureau. U.S. Const. Art. I, § 2, cl. 3; 2 U.S.C. § 2a; 13 U.S.C. § 141. There is a little more to the statutes-they specify a timetable, and a procedure for translating fractional into whole seats-but they say nothing about how to conduct a census or what to do about undercounts. So

nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in a case like this, *Webster v. Doe*, 486 U.S. 592, 599-600 (1988); *Heckler v. Chaney*, 470 U.S. 821, 830 (1985); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Scalise v. Thornburgh*, 891 F.2d 640, 648-49 (7th Cir. 1989); *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1264-65 (7th Cir. 1985)-that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness.

It would be otherwise if this suit were based on a concern with discrimination rather than with innocent inaccuracy. (The counterpart in weather forecasting would be a suit for

misrepresentation-and there *has* been such a suit, albeit against a private forecaster. *Grossman v. Citrus Associates,* 706 F. Supp. 221, 233-36 (S.D.N.Y. 1989).) We may assume that the Fifth Amendment authorizes courts to review census decisions argued to constitute invidious discrimination. We might even have a different case if the challenge were not to the Census Bureaus' statistical methodology but to some categorical judgment of inclusion or exclusion argued to be in violation of history, logic and common sense, as in *Massachusetts v. Mosbacher,* 1992 U.S. Dist. LEXIS 1975, at pp. *109-*111 (D. Mass. Feb. 20, 1992) (3-judge court), where, the court found, the Bureau had, in inexplicable reliance on a study planned but never conducted, changed its historic

practice of not trying to allocate overseas federal personnel to individual states. Maybe, in such a case, history, and logic, and common sense provide adequate materials for a lawlike judgment, though we have our doubts about both the provenance and the practicability of the right enforced in that case. But however, that may be, merely by directing congressional apportionment in accordance with the decennial census Article I, section 2, clause 3 does not authorize lawsuits founded on disagreement with the Census Bureau's statistical methodology.

The reapportionment cases do not dictate a contrary result, though they do authorize the courts to intervene in the process of apportioning representatives, even to the extent of reviewing the methods by which the states determine the

population of their electoral districts, *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969); *Burns v. Richardson*, 384 U.S. 73, 91-92 (1966); *Young v. Klutznick*, *supra*, 652 F.2d at 624, so far as that is necessary to assure equal voting power to every voter. Equality of voting power is an administrable standard; indeed, the most common argument against it is that it sacrifices flexibility in adjusting voting power to legitimate social or political interests (for example, the interest in enhancing the voting power of an isolated minority) on the altar of administrative simplicity. *Reynolds v. Sims*, 377 U.S. 533, 589, 622-23 (1964) (Harlan, J., dissenting). The plaintiffs claim to a census adjustment invokes no judicially administrable standards. The plaintiffs are not asking us to decree equality.

They are asking us to take sides in a dispute among statisticians, demographers, and census officials concerning the desirability of making a statistical adjustment to the census headcount.

Another difference between this case and the reapportionment cases is that the decennial census doesn't count just voters or even just people eligible to vote. In fact the undercount is concentrated among persons who either cannot vote (illegal aliens) or are unlikely to vote (a smaller fraction of poor than of affluent people vote). So this is not a case about depriving anybody of his right to vote or about diluting his voting power. If anything, the undercount enchances the political power of voters relative to that of nonvoters, by making their number decisive (or more decisive in the

apportionment of congressioanl representation and other political benefits. That was the ground on which the plaintiffs in *Federation for American Immigration Reform v. Klutznick, supra,* challenged the *inclusion* of illegal aliens in the decennial count. (An old issue. Margo J. Anderson, *The American Census: A Social History* 131-58 (1988).) They *wanted* an undercount, to enhance their own voting power.

Not only because the population shifts over a ten-year period, *Kirkpatrick v. Preisler, supra,* 394 U.S. at 535, but also because population and voting population are not the same, states are not required to sue census figures for the apportionment of their legislatures. *Burns v. Richardson, supra,* 384 U.S. 92-97. Realistically, it is true, a census

undercount may reduce the voting power of voters who are the natural allies of the undercounted, since an adjustment might give more representation to voters in states in which the undercounted are concentrated. But that is the kind of realism the Supreme Court rejected when it adopted the principle of "one man, one vote" over objections that malapportionment might actually increase the power of a minority by diluting the voting power of its opponents. See, e.g., *Kirkpatrick v. Preisler, supra,* 394 U.S. at 533-34. Correcting the undercount might actually offend against that principle, by creating disparities in voting power based not on differences in the number of voters but on differences in the number of nonvoters. On the other hand, it can be argued that people, not

just voters, are entitled to equal representation, *Federation for American Immigration Reform v. Klutznick, supra,* 486 F.Supp. at 577 n. 16, consistent with the Constitution's reference to apportioning congressional representation by "Numbers" (of people). Cf. *Wesberry v. Sanders, supra,* 376 U.S. at 18; *Kirkpatrick v. Preisler, supra,* 394 U.S. at 534. But all this is an aside. the dispositive consideration in this case is that, though even fine points of statistical methodology can have real consequences, a case about statistical methodology is a case whose gears fail to mesh with any judicially enforceable federal rights.

Affirmed.

Ripple, *Circuit Judge*, concurring. I concur in the judgment of the court. In my view, to the extent that he plaintiffs seek a redetermination of the Congress' apportionment of the seats of the House of Representatives, this suit presents a nonjusticiable political questions. *See, Baker v. Carr,* 369 U.S. 186 (1962); *Coleman v. Miller,*307 U.S. 433 (1939). The Constitution squarely places sole responsibility for this fundamental function of government on the Congress. U.S. Const. art I, §2,; cf. *McIntyre v. Fallahay,* 766 F.2d 1078, 1081 (7th Cir. 1985) (dispute arising out of congressional recount nonjusticiable in light of U.S. Const. art. I §5, cl. 1).

To the extent that the plaintiffs seek an order directing the Secretary of Commerce to present the Congress with a

revised count of the Nation's population, the plain language of the governing statute makes it clear that the matter is committed to agency discretion. *See Webster v. Doe*, 486 U.S. 592, 599-601 (1988); *Heckler v. Chaney*, 470 U.S. 821, 827-35 (1985). There is "no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (citing S. Rep. no. 752, 79th Cong., 1st Sess. 26 (1945)).

A true Copy:
Testee:

_____
Clerk of the United States Court
of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 29, 1992

Before

Hon. Walter J. Cummings, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge

ROBERT L. TUCKER, *et al.*,

Plaintiffs-Appellants,

No. 91-2051 v.

UNITED STATES DEPARTMENT OF COMMERCE; ROBERT A. MOSBACHER, as Secretary of Commerce, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 90 C 1724 - **Brian Barnett Duff**, Judge.

ORDER

On March 30, 1992 plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel

have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petitioner is therefore DENIED.

ARTICLE I, § 2

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty-five Years,and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State in which he shall be chosen.

(Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by

adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.) The actual Enumeration shall be made within Three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall be Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at least One Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six,

Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

U.S. Const. Art. I, §2

ARTICLE II, § 1

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and together with the Vice President chosen for the same Term, be elected, as follows

Each State shall appoint, in such Manner as the Legislature thereof, may

direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

(The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open

all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case,

after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.)

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years

a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law Provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other

Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: - "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

U.S. Const. Art. II, §1

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V

Amendment XIV

Section 1. All persons born or naturalized in the United States, and

subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive

and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. Amend. XIV

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have

power to enforce this article by appropriate legislation.

U.S. Const. Amend. XV

2 U.S.C. §2a.(a)(b)

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statutue, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge his duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of

vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

2 U.S.C. 2a.(a)(b) (1990)

3 U.S.C. §3

Number of electors

The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice- President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

3 U.S.C. §3 (1990)

5 U.S.C. §551

Definitions

For the purpose of this subchapter [5 USCS §§551 et seq.]--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41 [41 USCS §§ 101 et seq.]; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual,

partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or

financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit,

certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking,

seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or part of an agency--

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of,

and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter [5 USCS §§ 551 etc.].

5 U.S.C. §551 (1990)

5 U.S.C. §701 (a)(2)

Application; definitions

(a) This chapter [5 USCS §§701 et seq.] applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. §701 (a) (1990)

5 U.S.C. §702.

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an

officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers

authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §702 (1990)

13 U.S.C. §141

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total

population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

(c) The officers or public bodies having initial responsibility for the legislative apportionment or districting of each State may, not later than 3 years before the decennial census date, submit to the Secretary plan identifying the geographic areas for which specific tabulations of population are desired. Each such plan shall be developed in accordance with criteria established by the Secretary, which he shall furnish to such officers or public bodies not later than April 1 of the fourth year preceding

the decennial census date. Such criteria shall include requirements which assure that such plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan shall be developed in a nonpartisan manner. Should the Secretary find that a plan submitted by such officers or public bodies does not meet the criteria established by him, he shall consult to the extent necessary with such officers or public bodies in order to achieve the alterations in such plan that he deems necessary to bring it into accord with such criteria. Any issues with respect to such plan remaining unresolved after such consultation shall be resolved by the Secretary, and in all cases he shall have final authority for determining the geographic format of such plan. Tabulations of population for the areas

identified in any plan approved by the Secretary shall be completed by him as expeditiously as possible after the decennial census date and reported to the Governor of the State involved and to the officers or public bodies having responsibility for legislative apportionment or districting of such State, except that such tabulations of population of each State requesting a tabulation plan, and basic tabulations of population of each other State, shall, in any event, be completed, reported, and transmitted to each respective State within one year after the decennial census date.

(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-

decade census of population in such form and content as he may determine, including the use of sampling procedures and special surveys, taking into account the extent to which information to be obtained from such census will serve in lieu of information collected annually or less frequently in surveys or other statistical studies. The census shall be taken as of the first day of April of each such year, which date shall be known as the "mid-decade census date".

(e)(1)If--

(A) in the administration of any program established by or under Federal law which provides benefits to State or local governments or to other recipients, eligibility for or the amount of such benefits would (without regard to this paragraph) be

determined by taking into account data obtained in the most recent decennial census, and

(B) comparable data is obtained in a mid-decade census conducted after such decennial census,

then in the determination of such eligibility or amount of benefits the most recent data available from either the mid-decade or decennial census shall be used.

(2) Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees

of Congress having legislative jurisdiction over the census--

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be

modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

(g) As used in this section, "census of population" means a census of population, housing, and matters relating to population and housing.

13 U.S.C. §141 (1990)

28 U.S.C. § 1254

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law

in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in the controversy.

28 U.S.C. §1254 (1992)

28 U.S.C. §1291

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States Districts Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States

Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

28 U.S.C. §1291 (1990)

28 U.S.C. § 1331

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331 (1990)

28 U.S.C. § 1337

Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and

monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49 [49 USCS § 11707], only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11707 of title 49 [49 USCS 11707], originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any set of or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition,

may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title [28 USCS §§ 1581 et seq.].

28 U.S.C. § 1337 (1990)

28 U.S.C. § 1361

Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1361 (1990)

28 U.S.C. § 2101(c)

Supreme Court--Time for appeal or certiorari--Docketing--Stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil actin, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. § 2101(c) (1990)

42 U.S.C. § 1973

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political

subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 USCS § 1973(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a

protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1990)

Organization Order 35-2A

BUREAU OF THE CENSUS

Organization, Function, and Delegation of Authority

This order, effective August 4, 1975, supersedes the material appearing at 37 FR 3461 of February 16, 1972; 38 FR 9451 of April 16, 1973; 40 FR 8981 of March 4, 1975; 39 FR 26768 of July 23, 1974; 39 FR 38405 of October 31, 1974; and 40 FR 31651 of July 28, 1975.

Section 1. Purpose.

This order delegates authority to the Director of the Census and prescribes the functions of the Bureau of the Census.

Section 2. Status and line of authority.

01. The Bureau of the Census, established by the Act of March 6, 1902 (32 Stat. 51), is restored as a primary operating unit of the Department of

Commerce.

02. The Director of the Census (the "Director"), who is appointed by the President, by and with the advice and consent of the Senate, is the head of the Bureau. The Director shall report and be responsible to the Assistant Secretary for Economic Affairs.

.03 The Director shall be assisted by a Deputy Director who shall perform the functions of the Director during the former's absence.

Section 3. Delegation of authority.

01. Pursuant to the authority vested in the Secretary of Commerce by law, including reorganization Plan No. 5 of 1950 and 15 U.S.C. 1516, the Director is hereby delegated authority to perform the functions vested in the Secretary of Commerce under:

a. Title 13, Unites States Code;

b. Section 1516 of Title 15, United States Code, which relates to gathering and distributing statistical information, as applicable to the functions assigned therein; and

c. Section 8 of Executive Order 10999, which directs the Secretary to provide, as required for emergency planning purposes, for the collection and reporting of census information on the status of human and economic resources, including population, housing, agriculture, manufacture, mineral industries, business, transportation, foreign trade, construction and government.

02. The Director of the Census may exercise other authorities of the Secretary as applicable to performing the

functions assigned in this order.

03. The Director may delegate his authority to any employee of the Bureau subject to such conditions in the exercise of such authority as he may prescribe.

Section 4. Functions.

The Bureau of the Census shall perform the following functions:

a. In cooperation with business and industry, Government, and other public or private organizations conduct censuses and surveys and otherwise collect, process and analyze statistical data relating to the social and economic activities and characteristics of the population and enterprises of the United States or other areas prescribed by law, and publish and disseminate the resulting statistics for use by business, Government agencies and the public;

b. Conduct special statistical studies on domestic and foreign trade, business services, industry, transportation, construction, agriculture, population and housing, and on Federal, State and local governments; and, based thereon, issue reports, special tabulations and monographs;

c. Conduct statistical and other research and development activities directed toward improving quality and lowering costs of censuses and surveys; and achieving more effective censuses and surveys; and

d. Develop and maintain a statistical directory of establishments engaged in economic activity in the United States for use by and for Federal agencies for statistical purposes, taking care to preserve the confidentiality of

information obtained for the Bureau from other Federal agencies, as may be deemed appropriate or as may be required by law.

Section 5. Savings provisions.

All rules, regulations, orders, determinations, authorizations, contracts, grants, agreements, and other action issued, undertaken or entered into by or for the Social and Economic Statistics Administration shall remain in full force and effect until they expire in due course or are revoked or amended by appropriate authority.

Section 6. Transitional provisions.

The Assistant Secretary of Administration shall establish the effective date of the necessary transfers of funds an positions and/or personnel from the Social and Economic Statistics Administration and, in cooperation with

the Assistant Secretary for Economic Affairs, determine the amount of funds, positions, and personnel to be transferred.

Effective: August 4, 1975.

Guy W. Chamberlin, Jr.,
Acting Assistant Secretary
for Administration

FILED
OCT 6 1992
CLERK

No. 92-194

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT L. TUCKER, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EXECUTIVE BRANCH RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the dismissal of petitioners' suit to compel a statistical adjustment to the 1990 decennial census.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Carey v. *Klutznick:*	
653 F.2d 732 (2d Cir. 1981), cert. denied, 455 U.S. 999 (1982)	3
637 F.2d 834 (2d Cir. 1980)	12
City of Detroit v. *Franklin*, No. 91-CV-73672-DT (E.D. Mich. Aug. 14, 1992), appeal pending, No. 92-2113 (6th Cir.)	12
Department of Commerce v. *Montana*, 112 S. Ct. 1415 (1992)	3, 10
Franklin v. *Massachusetts*, 112 S. Ct. 2767 (1992)	3, 4, 9, 10
Texas v. *Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992)	12
Webster v. *Doe*, 486 U.S. 592 (1988)	9
Young v. *Klutznick*, 652 F.2d 617 (6th Cir. 1981), cert. denied, 455 U.S. 939 (1982)	11

Constitution and statutes:

U.S. Const. Art. I, § 2, Cl. 3 (Apportionment Clause)	2, 10
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:	
5 U.S.C. 701(a)(1)	9
5 U.S.C. 701(a)(2)	9
5 U.S.C. 704	9

Statutes—Continued: Page

Census Act, 13 U.S.C. 1 *et seq.* 2, 9
13 U.S.C. 2 3
13 U.S.C. 141(a) 2, 9
13 U.S.C. 141(b) 2
13 U.S.C. 181-184 11
2 U.S.C. 2a 2, 4
2 U.S.C. 2a(a) 2, 4
2 U.S.C. 2a(b) 3, 4

Miscellaneous:

Bureau of the Census, United States Department of Commerce, Press Release, CB91-221 (June 13, 1991) 6
56 Fed. Reg. (1991):
p. 33,582 4
pp. 33,582-33,583 4
p. 33,584 5
p. 33,593 5
pp. 33,610-33,623 5
pp. 33,626-33,636 5
David A. Freedman, *Adjusting the 1990 Census*, 252 Science 1233 (1991) 5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37-77) is reported at 958 F.2d 1411. The district court's opinion (Pet. App. 1-36) is reported at 135 F.R.D. 175.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1992. A petition for rehearing was denied on April 29, 1992. Pet. App. 78-79. The petition for a writ of certiorari was filed on July 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Article I, § 2, Cl. 3 of the Constitution requires Congress to conduct a decennial census for the purpose of determining the number of representatives to which each State is entitled in the U.S. House of Representatives. That provision provides that the "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" and directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct."

The statutory implementation of this process appears in Title 13 and in 2 U.S.C. 2a. Pursuant to Title 13, the Secretary must complete and report to the President a "tabulation of total population by States" for the purpose of apportionment of congressional seats within nine months after the census date. 13 U.S.C. 141(b). The statute does not set forth detailed methodological requirements, but instead vests discretion in the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). After the census has been completed, and within a week after the beginning of the first session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in each State * * * and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions." 2 U.S.C. 2a(a). Finally, within 15 days of the receipt of the statement, the Clerk of the House must "send to the

executive of each State a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b). See generally *Department of Commerce* v. *Montana*, 112 S. Ct. 1415 (1992); *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992).

2. The "actual Enumeration" required by the Constitution always has been made through an actual count of individuals, rather than statistical estimations, even though there have been concerns about undercounts from the time of the first census in 1790. See *Carey* v. *Klutznick*, 653 F.2d 732, 735 (2d Cir. 1981), cert. denied, 455 U.S. 999 (1982). In connection with the 1980 and the 1990 censuses, the Census Bureau[1] has considered proposals to adjust the actual headcount statistically. Both the 1980 and 1990 censuses have spawned considerable litigation by States (and their localities and citizens) who have assumed that they would fare better under a statistical alteration.[2] In 1987, the Commerce Department decided that it would not make a statistical adjustment to the 1990 census headcount. In July 1989, however, the Department agreed to vacate this decision in a stipulation in an action brought by New York and other parties in the United States District Court for the Eastern District of New York. See *City of New York* v. *Department of Commerce*, 739 F. Supp. 761, 763 (E.D.N.Y. 1990). In the stipulation, the Department agreed to undertake de novo consideration of the adjustment question, and to issue a final decision no later than July 15, 1991. *Id.* at 769.

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[1] The Census Bureau is "an agency within, and under the jurisdiction of, the Department of Commerce." 13 U.S.C. 2.

[2] See *Carey* v. *Klutznick*, 653 F.2d at 735 n.10 (citing 36 cases in which States and municipalities sought adjustments to the 1980 census).

While this reconsideration took place, the Executive Branch complied with the statutory mandate of the Census Act; the census count was completed, and the President transmitted the census results to the Congress within the time limitations set forth in 2 U.S.C. 2a(a). As required by 2 U.S.C. 2a(b), the Clerk of the House has certified to each State the number of representatives to which it is entitled under those figures.[3]

On July 15, 1991, the Secretary determined that the census headcount should not be adjusted on the basis of a statistical methodology. 56 Fed. Reg. 33,582. The Secretary recognized the existence of undercounts in the census tabulation, but concluded that it was unclear that adjusting the headcount would improve the accuracy of the census and that adjustment might introduce new distortions as well as new fears of political manipulation. *Id.* at 33,582-33,583.

The Secretary explained that the Census Bureau had conducted an intensive investigation into an adjustment technique that relied primarily on a process known as dual system estimation. In this process, the Secretary conducted a post-census sample survey—the post-enumeration survey (PES)—of approximately 170,000 housing units in 12,000 blocks from across the nation, representing about one-sixth of one percent of the population of the United States.

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[3] Both Congress and the Clerk accepted the President's statement as validly triggering their obligations under 2 U.S.C. 2a, notwithstanding the proviso contained in the transmittal (inserted in compliance with the stipulation entered into in *City of New York*) that "The Department of Commerce is considering whether to correct these counts and will publish corrected counts, if any, not later than July 15, 1991." See *Franklin*, 112 S. Ct. at 2783 n.13 (Stevens, J., concurring in the judgment).

The blocks were selected to ensure that they included representatives of 1392 population subgroups known as "post strata," designed to reflect all of the various demographic components of the nation's population. The information gathered from the PES was compared with the information obtained during the census for those blocks. By comparing the data, an adjustment factor was developed for each post stratum that reflects the percent by which the PES indicated that the census overcounted or undercounted the population in that post stratum. An adjustment would have been accomplished by multiplying the number of people from each post stratum that the census located in each of the almost 5,000,000 blocks nationwide by the appropriate adjustment factor for that post stratum. See 56 Fed. Reg. at 33,626-33,636; see also David A. Freedman, *Adjusting the 1990 Census*, 252 Science 1233, 1234-1236 (1991) (providing a concise description of the process).

Opinions among career professionals at the Census Bureau, and among a panel of outside experts including some of the most highly regarded statisticians in the country, were sharply divided over the accuracy and efficacy of this method of adjustment. See, *e.g.*, 56 Fed. Reg. at 33,610-33,623 (recommendations of panel members). The Secretary determined that because the constitutional purpose of the census is to apportion seats in the House of Representatives, accuracy for adjustment purposes must be defined to mean "distributive accuracy—that is, getting most nearly correct the proportions of people in different areas," as opposed to an improvement in the accuracy of the total population count at the national level. *Id.* at 33,584; see *id.* at 33,593. Having considered advice both in favor of, and in opposition to, adjustment, the

Secretary concluded that there was no clear evidence that an adjustment would improve the distribution of the population and therefore that no adjustment should be made.

The administrative record provided considerable information regarding the effect the proposed adjustment would have on the census headcount. Applying these statistical assumptions, the Illinois population would have been adjusted upward from 11,430,602 to 11,592,000, but Illinois' percentage of the entire national population would have declined from 4.5960% to 4.5642%.[4] The adjustment would not have altered the number of congressional seats allotted to Illinois, although it would have resulted in seats being gained by California and Arizona, at the expense of seats being lost by Wisconsin and Pennsylvania. See Pet. App. 44.

3. Petitioners, eleven Illinois residents, filed this suit against the Department of Commerce, various Executive Branch officials, and the Clerk of the United States House of Representatives. Petitioners contended that the alleged undercount affected their political representation at the national, state, and local level and also would prevent them from receiving a proper share of funds and governmental services distributed under government programs on the basis of census population figures. See Pet. App. 3-4. Petitioners sought an order requiring the government to adjust the 1990 census to correct undercounts or overcounts in the population and to use the adjusted figures for all purposes for which decennial census data are used. *Id.* at 4. The district court dismissed petitioners' claims in their entirety (*id.* at

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[4] See Bureau of the Census, United States Department of Commerce, Press Release CB91-221, Table 5 (June 13, 1991).

1-36), based on its holding that the claims raised a nonjusticiable political question. *Id.* at 14-35. The court explained that the Constitution commits to Congress the authority to determine the manner in which a census shall be taken, *id.* at 30-32, and that it could discern no judicially manageable standards for determining whether an adjustment was proper, *id.* at 32-33. Finally, the court expressed concern about the imposition of inconsistent judgments regarding the propriety of adjustment. *Id.* at 34-35.

4. The court of appeals affirmed. Pet. App. 37-77. Although it rejected the district court's reliance on the political-question doctrine (*id.* at 54-56), it nevertheless concluded that petitioners had failed to establish a right to compel statistical adjustments designed to achieve a more accurate census. The court viewed the dispositive question as whether "the various provisions invoked by [petitioners] should be construed to authorize suits for judicial review of inaccurate census determinations," and concluded that "our answer is no." *Id.* at 64. The court noted that "[e]very methodological decision made in the government's statistical programs has a potentially adverse impact on some, perhaps many, persons," *ibid.*, and concluded that it would be inappropriate to allow all such persons to seek judicial review of such decisions, *id.* at 65-66.

The court also noted several other factors that influenced its decision, explaining that "[i]t might be different if the apportionment clause, the census statutes, or the Administrative Procedure Act contained guidelines for an accurate decennial census, for that would be some evidence that the framers of these various enactments had been trying to create a

judicially administrable standard." Pet. App. 66-67.[5] Similarly, the court observed that "[i]t would be otherwise if this suit were based on a concern with discrimination rather than with innocent inaccuracy," *id.* at 68. In sum, the court concluded, "[t]he dispositive consideration in this case is that, though even fine points of statistical methodology can have real consequences, a case about statistical methodology is a case whose gears fail to mesh with any judicially enforceable federal rights." 958 F.2d 1411, 1419 (1992).[6]

Judge Ripple concurred in the judgment. Pet. App. 76-77. In Judge Ripple's view, the case should be dismissed for two reasons. First, petitioners' claims present nonjusticiable political questions to the extent they seek review of the apportionment of congressional seats. *Id.* at 76. Second, to the extent that petitioners seek an order requiring the Executive Branch to present a revised population count to Congress, "the plain language of the governing statute makes it clear that the matter is committed to agency discretion." *Id.* at 77.

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[5] On this point, the court noted that the relevant statutes are "[s]o nondirective * * * that it is arguable that there is no law for a court to apply in a case like this." Pet. App. 67-68. In light of the disposition of the case by the panel, the court had no occasion to consider whether the lack of law to apply posed an independent basis for dismissal of petitioners' claims. As noted below, Judge Ripple addressed that argument and concluded that petitioners' claims could have been dismissed on that basis.

[6] This portion of the court of appeals' opinion is quoted from the reported opinion because it does not appear accurately in the appendix to the petition.

ARGUMENT

1. This Court's decision last Term in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992)—decided three months after the court of appeals' decision in this case—makes it clear that the court of appeals correctly rejected petitioners' claims.

a. First, the Court held in *Massachusetts* that the Administrative Procedure Act (APA) does not provide for review of challenges to the manner in which the census was conducted, because the only "final agency action" under 5 U.S.C. 704 is the President's statement to Congress. 112 S. Ct. at 2773-2775. That statement is not susceptible to attack under the APA, because the President is not an "agency" under the APA. *Id.* at 2775-2776. Accordingly, because the APA is the only waiver of sovereign immunity that would permit petitioners' statutory claims to proceed, those claims must fail under *Massachusetts*.[7]

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[7] Because this Court concluded in *Massachusetts* that APA review was not available for the reasons explained in the text, it had no occasion to consider the government's arguments (see 91-1502 Gov't Br. 16-33) that review also was precluded by the language and structure of the Census Act, 13 U.S.C. 1 *et seq.*, and that agency determinations with regard to the census were committed to agency discretion by law. See 5 U.S.C. 701(a)(1) and (2). As we explained there, the Census Act sets out a comprehensive timetable for reporting the apportionment counts to the President, and in turn to Congress, which suggests that Congress did not contemplate judicial review and the attendant delays. Moreover, the statute otherwise vests discretion in the Secretary of Commerce to conduct the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. 141(a). This unfettered grant of discretion strongly indicates that the matter is committed to agency discretion by law. See *Webster* v. *Doe*, 486 U.S. 592, 599-600 (1988).

b. *Massachusetts* mandates a similar result for petitioners' constitutional claims. As the Court explained in *Massachusetts*, a court evaluating a constitutional challenge to the census can only "review the dispute to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation." 112 S. Ct. at 2777; see *id.* at 2778 (a court should uphold a decision regarding census procedures if it is "consonant with, though not dictated by, the text and history of the Constitution"). Under this standard, petitioners' constitutional claims are meritless.

First, the practice challenged by petitioners is consistent with the constitutional language. The Apportionment Clause, Art. 1, § 2, Cl. 3, requires an "actual Enumeration * * * in such Manner as [Congress] shall by Law direct." It is implausible to suggest that this Clause requires the government to forgo reliance on the "actual Enumeration," and instead to rely on statistical estimates, especially in light of the consistent practice, for over two centuries, of relying on the actual headcount. Cf. *Massachusetts*, 112 S. Ct. at 2777 (noting importance of historical practice). Indeed, because the Constitution provides that the actual enumeration may be taken "in such Manner as [Congress] shall by Law direct," there can be no textual basis for setting aside any good-faith effort to conduct an "actual Enumeration." Cf. *Department of Commerce* v. *Montana*, 112 S. Ct. 1415, 1429 (1992) (considerable deference is due Congress's "apparently good-faith choice of a method of apportionment"). As the court of appeals observed, "merely by directing congressional apportionment in accordance with the decennial census Article I, Section 2, Clause 3 does not authorize lawsuits

founded on disagreement with the Census Bureau's statistical methodology." Pet. App. 70.

Second, the decision not to adjust does not undermine the goal of equal representation. The adjustment sought by petitioners would not affect the number of seats to which Illinois is entitled in the federal legislature. See Pet. App. 44. Also, the results of the census have no determinate effect on the allocation of those seats among the citizens of Illinois, or in the apportionment of local and state legislative bodies, because neither the Constitution nor any federal statute requires the use of census data for intrastate redistricting. See *Young* v. *Klutznick*, 652 F.2d 617, 624 (6th Cir. 1981), cert. denied, 455 U.S. 939 (1982). Indeed, the Illinois legislature might have chosen to rely upon unadjusted figures even if the Secretary had determined that an adjustment was appropriate.[8]

---

[8] Finally, *Massachusetts* makes clear that petitioners err in relying on the possibility that the failure to adjust the census will impair their access to federal funds; even if petitioners are deprived of certain federal funds because of errors in the census, they would not in any way have lost the "equal representation" that is the goal of the Court's apportionment decisions. Moreover, Congress is not required to allocate federal funds to states and localities on the basis of population. If Congress does elect to distribute funds on a population basis, it may use adjusted or unadjusted figures, as it chooses. In any event, the Census Bureau produces "intercensal" estimates of the population in each of the years between the decennial censuses, which are used in various programs that distribute federal funds based on population characteristics. 13 U.S.C. 181-184. Because the Census Bureau has not yet determined whether it will incorporate information regarding undercounts and overcounts gleaned from the PES into the base for intercensal population estimates, it is quite speculative to suggest that undercounts in the 1990 census will have any continuing effect on the allocation of funds under such programs.

2. Contrary to petitioners' suggestion (Pet. 27-28), the decision of the court of appeals does not conflict with the decisions of other circuits. The only court of appeals decision petitioners cite as in conflict, *Carey* v. *Klutznick*, 637 F.2d 834, 838-839 (2d Cir. 1980), was decided long before this Court's decisions in *Massachusetts* and *Montana*, which clarified the applicable principles. Although several other suits seeking to compel a statistical adjustment to the 1990 census have been filed in various federal district courts,[9] no court of appeals has addressed an adjustment claim in light of those decisions. Accordingly, the questions presented by petitioners do not merit review by the Court at this time.

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[9] See *City of Detroit* v. *Franklin*, No. 91-CV-73672-DT (E.D. Mich. Aug. 14, 1992) (granting summary judgment for the government), appeal pending, No. 92-2113 (6th Cir.) (notice of appeal filed Sept. 1, 1992); *Texas* v. *Mosbacher*, 783 F. Supp. 308 (S.D. Tex. 1992) (denying motion to dismiss complaint of private parties and granting motion to dismiss complaint of State of Texas with leave to amend); *City of New York* v. *Department of Commerce*, No. 88-Civ-3474 (E.D.N.Y.) (awaiting decision after trial); *City of Toccoa* v. *Department of Commerce*, No. 2-91-CV-40 WCO (N.D. Ga.) (Gov't Mot. to Dis. denied Mar. 5, 1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1992

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ROBERT L. TUCKER, JOYCE BANKS, WILL McGAUGHY, NAPOLEON HANEY, LAUREL PRUSSING, JOAN M. CLARK, OUSLEY H. WALKER, CAROLYN TONEY, JOSEPH BELMAN, President of the Illinois Hispanic Council, Joliet Chapter, RICHARD J. WALSH, President of the Illinois State Federation of Labor, AFL-CIO, and JAMES CLARIN,

Petitioners,

v.

UNITED STATES DEPARTMENT OF COMMERCE, ROBERT A. MOSBACHER, as Secretary of the Department of Commerce, MICHAEL R. DARBY, as Under Secretary for Economic Affairs of the United States Department of Commerce, BUREAU OF THE CENSUS, BARBARA E. BRYANT, as Director of the Bureau of the Census, GEORGE H. W. BUSH, as President of the United States, and DONNALD K. ANDERSON, as Clerk of the United States House of Representatives,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents cite *Franklin v. Massachusetts*, ___ U.S. ___, 112 S.Ct. 2767 (1992), and *Department of Commerce v. Montana*, ___ U.S. ___, 112 S.Ct. 1415 (1992), in support of their argument that petitioners' petition for writ of *certiorari* should be denied.

Massachusetts and *Montana*, however, call for this Court to review the merits of petitioners' claims. In both cases, this Court determined that it had the ability to decide and did decide constitutional claims directed at the 1990 Decennial Census. Petitioners respectfully submit that this Court's recent decisions require the same, if not greater, scrutiny of their constitutional claims: after all, in both *Massachusetts* and *Montana*, the people had at least been counted, while this case challenges our Government's inexcusable and inexplicable failure even to count people -- predominantly African-Americans and Hispanics -- whom the Government knows and has known for 50 years to actually exist, and there are statistical measures available to ensure that these Americans are included in

the census. The questions in *Massachusetts* and *Montana* related to policy decisions about how to allocate military personnel and Congressional delegations given a specific population count. This case concerns a failure to count people which results from a refusal to employ valid and accepted methods to correct a known and recognized defect in the enumeration process. The "policy" decision made here, as asserted in petitioners' complaint, is the decision not to follow what petitioners view to be the mandate of the Constitution, and that is not and should never be a "policy" decision immune from judicial review.

Respectfully submitted,

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